BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDY MIDDLEBROOK, Claimant, vs. EAST PENN MANUFACTURING CO., INC., Employer, and SENTINEL INSURANCE CO., LTD., Insurance Carrier, Defendants.	File No. 19002848.01 ARBITRATION DECISION Head Notes: 1402.40; 1804; 1806; 1807; 2206; 2501; 2502; 2701; 2907

STATEMENT OF THE CASE

Claimant Randy Middlebrook filed a petition in arbitration seeking worker's compensation benefits against East Penn Manufacturing Company, Inc., employer, and Sentinel Insurance Company, Ltd., insurer, for an accepted work injury date of January 18, 2019.[1] The case came before the undersigned for an arbitration hearing on May 19, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 12, Claimant's Exhibits 13 through 26, and Defendants' Exhibits A through J.

[1] On the record, the undersigned misstated the date of injury as January 8, 2019. The correct date of injury is January 18, 2019. (See Hearing Transcript, p. 5)

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on May 19, 2021. The parties submitted post-hearing briefs on June 25, 2021, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant is entitled to temporary disability benefits;
2. The extent of industrial disability, including permanent total disability;
3. Payment of certain medical expenses;
4. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;
5. Payment of claimant's independent medical examination under Iowa Code section 85.39; and
6. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

At the time of hearing, claimant was a 68-year-old person. (Hearing Transcript, p. 48) He resides in Corydon, Iowa, where he has lived all his life. (Tr., p. 46) Claimant graduated from high school in 1971, after which he enlisted in the Army. (Tr., pp. 46-47) He served in the Army until 1974, and then obtained an associate's degree in auto body repair. (Tr., pp. 46-47; Claimant's Exhibit 13, p. 279)

As early as the late 1960s, claimant began hauling grain driving straight trucks for his grandfather's grainery, and then started driving tractor-trailers with his father. (Tr., p. 69) In approximately 1982, claimant started working at Jimmy Dean as an over-the-road driver. Claimant worked at Jimmy Dean for ten years, until the plant closed. (Tr., p. 70) After the plant closed, claimant had a little shop and did odd jobs such as mowing, until he went to work for Corydon Oil Company in approximately 1996. (Tr., p. 70; Cl. Ex. 13, p. 278) Claimant worked as a truck driver hauling propane until about 2006, when he was terminated due to a shoulder injury. (Cl. Ex. 13, p. 278)

Claimant then went to work at a funeral home doing lawn work and general maintenance, and was also responsible for picking up and transporting deceased individuals and helping with funerals. (Tr., p. 70; Defendants' Exhibit E, Deposition Transcript, p. 15) Claimant worked there until about 2009, when he left to work at NAPA Auto Parts. (Tr., pp. 70-71; Cl. Ex. 13, p. 278) Claimant worked as a counter person at NAPA for a short time, and then started at East Penn Manufacturing Company ("East Penn"), defendant employer, in December 2010. (Tr., p. 71; Cl. Ex. 13, p. 278) East Penn makes batteries, some of which weigh up to 70-pounds. (Tr., p. 50; 74)

When claimant was first hired at East Penn, his position was a "floater," meaning he would move batteries, place stickers on them, put battery caps on, and move them onto pallets. (Tr., p. 71) He testified that he would have to lift up to 70 to 75 pounds. (Tr., p. 72) He was then moved to a position as an outside forklift operator, in which he would bring product inside, such as battery cases, and would load and unload trucks, and stack pallets. (Tr., p. 72) Once his employer discovered he possessed a commercial drivers' license (CDL), he was offered a job as a shag driver, in which he would move trailers around the yard, load and unload trailers, and bring in empty trailers. (Tr., p. 73) Finally, in mid-2011, he became an over-the-road driver for East Penn, and maintained that position until the date of his injury. (Tr., p. 49)

Claimant's job as an over-the-road driver for East Penn had him delivering loads of batteries from Iowa generally to Pennsylvania or the Carolinas. (Tr., p. 50) He was required to perform pre-trip inspections, which included opening the hood of the tractor. He was required to manually dolly the trailer up and down, and at times he would have to load and unload his trailer. (Tr., p. 50) He described the job as very physically demanding. (Tr., p. 50) The job description provided by defendants indicates the job requires occasional lifting to waist level greater than 75 pounds; occasional carrying greater than 75 pounds; occasional stooping/bending/squatting; and frequent turning/twisting, pushing and pulling, and reaching, among other things. (Def. Ex. D, p. 1) The job description also notes that drivers may be required to assist in loading or unloading with a forklift or manually, up to 100 pounds.

On January 18, 2019, claimant was performing his pre-trip inspection as usual. (Tr., p. 51) At one point, claimant went to exit his truck, and ice had accumulated on one of the steps. Claimant's feet slipped out from underneath of him, but he had a good grip on the grab handle so he did not fall to the ground. (Tr., p. 51; Def. Ex. E, Dep. Tr., p. 24) However, when his feet slipped out, it gave him a "hard jerk" because he was still holding on to the handle. (Tr., p. 51; Def. Ex. E, Dep. Tr., p. 25) He also hit his knee on the step. He immediately felt a sharp pain in the right side of his back and down his leg. (Tr., p. 51)

Claimant testified that although he had experienced prior back problems, this pain was different, and he had never had this kind of sharp pain in the right side of his back and down his leg before. (Tr., p. 51) Claimant testified that his prior back pain was generally resolved by seeing a chiropractor. (Def. Ex. E, Dep. Tr., p. 27) He has been a patient at Heffron Chiropractic Care in Corydon since at least 2016. (Def. Ex. E, Dep. Tr., pp. 31-32; Joint Exhibit 1, p. 1) Prior to the work injury, claimant would have lower back pain every couple of weeks or every month. (Def. Ex. E, Dep. Tr., p. 32) Sometimes he would see his chiropractor, and his back pain would resolve. (Def. Ex. E, Dep. Tr., p. 38) At times, his back pain would resolve without seeing the chiropractor. (Def. Ex. E, Dep. Tr., p. 35) As such, initially after the incident he assumed the pain would resolve on its own, or with chiropractic treatment. (Tr., p. 52)

Claimant sought chiropractic treatment with his usual chiropractor, Patrick Heffron, D.C. (Jt. Ex. 1) There are 86 pages of Dr. Heffron's records contained in joint

exhibit 1, representing 43 separate chiropractic visits. Of those 43 visits, 17 occurred prior to the date of injury, between 2016 and 2018. (Jt. Ex. 1, pp. 1-34) The remaining 26 visits occurred after the date of injury, between January 23, 2019 and August 23, 2019. (Jt. Ex. 1, pp. 35-86) In addition to treating claimant's low back complaints, Dr. Heffron also provided treatment for neck pain, mid back pain, and shoulder pain on several occasions. (Jt. Ex. 1) None of Dr. Heffron's records prior to the date of injury note any complaints of radiating pain. (Jt. Ex. 1, pp. 1-34)

At his first chiropractic visit following the work injury, on January 23, 2019, claimant reported low back pain over the right gluteal region, at a level 5 of 10. (Jt. Ex. 1, p. 35) At the following visit on February 2, 2019, claimant's pain had increased to level 6, and he reported pain radiation into his right lower extremity. (Jt. Ex. 1, p. 37) At each visit that followed in 2019, claimant consistently reported ongoing pain over the right lower back and right lumbopelvic region, at a level 5 of 10. (Jt. Ex. 1, pp. 39-86)

After the first few weeks of chiropractic care following the injury, claimant's pain had not improved, so Dr. Heffron suggested he see his personal care physician, Joel Baker, D.O. Dr. Baker was out of the office at the time of claimant's first appointments, so claimant saw his partner, Ernest Perea, M.D. (Tr., p. 53) Claimant saw Dr. Perea on February 20, 2019, and reported moderate low back pain radiating into the right leg and right knee. (Jt. Ex. 2, p. 87) Dr. Perea noted that the injury happened when claimant slipped getting into his new truck at work,[2] and claimant would have a discussion with his employer the next day. Dr. Perea further noted claimant's past medical history is notable for a history of degenerative arthritis lumbar spine, and a history of episodic low back pain without formal low back pain workup. (Jt. Ex. 2, p. 87)

Dr. Perea performed a physical examination and took lumbar spine x-rays. (Jt. Ex. 2, pp. 89-90) His assessment was low back pain and sciatica, and he noted significant degenerative pathology on the x-ray. He advised claimant to follow up with him whether the injury was work related or not, and continue with chiropractic care. He did not assign any work restrictions. (Jt. Ex. 2, p. 90)

Claimant testified that after his visit with Dr. Perea, he reported the injury to his employer. (Tr., p. 54) He was also having difficulties doing his job, including getting in and out of his truck, and pain when he would dolly his trailer down and hook it. (Tr., p. 54) At his next visit with Dr. Perea on February 25, 2019, Dr. Perea ordered an MRI and NCV/EMG of the lower extremities. (Jt. Ex. 2, p. 94)

A lumbar MRI took place on March 16, 2019. (Jt. Ex. 2, pp. 100-101) The NCV/EMG took place on March 18, 2019. (Jt. Ex. 3, p. 145) Claimant followed up with Dr. Perea on March 23, 2019. (Jt. Ex. 2, p. 102) At that time he was reporting pain now radiating into both the right and left legs. Dr. Perea noted that claimant's "past medical history is noncontributory," and his treatment was related to a work related injury. Dr. Perea reviewed the MRI and NCV/EMG, and noted that they "corroborate pathology

[2] At later visits with Dr. Perea, the history is corrected to note claimant was actually exiting his vehicle.

explaining his low back pain and right leg sciatica symptomology." (Jt. Ex. 2, p. 104) He referred claimant to David Boarini, M.D.

Claimant saw Dr. Boarini at The Iowa Clinic on April 22, 2019. (Jt. Ex. 4, p. 147) He noted claimant complained of back pain with radiation down both legs, numbness and tingling in both legs, and spasms. Dr. Boarini's assessment was lumbar radiculopathy and spinal stenosis of lumbar region with neurogenic claudication. (Jt. Ex. 4, p. 149) He noted in reviewing the MRI, claimant had mild stenotic changes at L2-3 and L4-5 with minimal changes elsewhere. (Jt. Ex. 4, p. 150) He did not believe there was a need to rush to surgery, so he recommended an epidural steroid injection, physical therapy, and nonsteroidals. (Jt. Ex. 4, p. 150)

On May 7, 2019, claimant attended an independent medical examination (IME), at defendants' request, with Michael Jacoby, M.D. (Jt. Ex. 5) Dr. Jacoby reviewed medical records from Dr. Perea at South Central Iowa Medical Clinic from February 20, 2019, through March 23, 2019, and records from Wayne County Hospital from February 20, 2019 through March 15, 2019.[3] (Jt. Ex. 5, p. 170) After physical examination, Dr. Jacoby opined that claimant's work injury was a back sprain/strain, sciatica like discomfort, and meralgia paresthetica. (Jt. Ex. 5, p. 171) He related claimant's diagnosis and symptoms to the work injury of January 18, 2019. He noted, however, that claimant had preexisting spine abnormalities as evidenced by the MRI, which were not caused by the work injury. Dr. Jacoby found that all treatment, testing, therapy, and medications to date had been reasonable, necessary, and related to the work injury. With respect to additional treatment, Dr. Jacoby recommended that claimant continue with back exercise, use of his inversion table, and chiropractic care, if he finds benefits from them. He did not believe any injections or surgery were indicated, but he said analgesic medications could be considered. (Jt. Ex. 5, p. 171)

With respect to restrictions, Dr. Jacoby recommended claimant not engage in heavy lifting, particularly over 50 pounds, for the "health of his back." (Jt. Ex. 5, p. 172) He noted that most individuals with this type of injury recover over a 6-week period, and as such, placed claimant at maximum medical improvement (MMI) as of May 7, 2019. In an addendum, Dr. Jacoby clarified that with respect to chiropractic treatments, claimant could continue with chiropractic therapy for three months, consisting of two sessions weekly. (Jt. Ex. 5, p. 173) In a second addendum, he clarified that the restrictions he recommended are permanent in nature. (Jt. Ex. 5, p. 174) He also provided a 2 percent whole person impairment rating, using the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment. (Jt. Ex. 5, p. 174)

Claimant saw Kellie Gates, M.D., at The Iowa Clinic on June 5, 2019. (Jt. Ex. 4, p. 151) Dr. Gates recommended a lumbar epidural steroid injection, physical therapy, and home exercises. (Jt. Ex. 4, p. 154) Claimant returned to Dr. Gates on June 24,

[3] There appears to be a typographical error in the date, as the MRI at Wayne County Hospital took place on March 16, 2019, and the report is dated March 18, 2019. (Jt. Ex. 2, pp. 100-101) It does appear from his record that Dr. Jacoby reviewed the MRI report, but it is unclear whether he reviewed the actual MRI film.

2019 for a left lumbar epidural injection at L2-3. (Jt. Ex. 4, p. 156) Claimant then saw Dr. Baker on July 26, 2019. (Jt. Ex. 2, p. 105) He told Dr. Baker that his back was worse, and he had no relief from the epidural 4 weeks prior. Dr. Baker recommended claimant be off work until his next evaluation, and also reiterated Dr. Gates' recommendation for physical therapy. (Jt. Ex. 2, p. 108) Claimant testified that he has not returned to his job at East Penn, or any other employment, since Dr. Baker took him off work on July 26, 2019. (Tr., p. 68) It is claimant's understanding that he remains on medical leave, and East Penn has not offered him any work since July 26, 2019. (Tr., pp. 68-69) Personnel records indicate claimant's leave of absence has been extended until January 31, 2022. (Cl. Ex. 17, p. 286)

Claimant followed up with Dr. Boarini on August 7, 2019. (Jt. Ex. 4, p. 158) He again stated the injections provided minimal relief of his symptoms. At that time, claimant had received two weeks of physical therapy. Dr. Boarini determined that claimant had failed conservative treatment, and was a candidate for a lumbar laminectomy at L2 though L5 due to his "fairly severe" lumbar stenosis. (Jt. Ex. 4, p. 160)

On August 28, 2019, defendants' representative wrote to Dr. Boarini, and indicated that Dr. Jacoby's report stated no further treatment was necessary. (Cl. Ex. 24) Based on that report, defendants determined they would not authorize payment for any further services, and "any treatment beyond this date will be considered self-procured and the responsibility of the patient." (Cl. Ex. 24, p. 315)

Claimant continued to seek medical care on his own. He underwent a lumbar laminectomy and medial facetectomy L2 through L5 on September 3, 2019.[4] (Jt. Ex. 4, p. 163) He followed up with Dr. Boarini on October 2, 2019, at which time he reported some tightness on the right side with some radiation to the right anterior thigh, but indicated it was much better. (Jt. Ex. 4, p. 164) Dr. Boarini ordered physical therapy. (Jt. Ex. 4, p. 165)

Claimant saw Dr. Baker on October 28, 2019, at which time he continued to have pain radiating into his right leg. (Jt. Ex. 2, p. 122) Dr. Baker felt claimant should continue physical therapy for an additional month, and was not able to return to work at that time. (Jt. Ex. 2, pp. 122-123) Claimant saw Dr. Baker again on November 20, 2019, at which time he had recently started prednisone. (Jt. Ex. 2, p. 124) He reported doing a little bit better with the steroids, and Dr. Baker thought he may need a referral to a pain specialist for injections. (Jt. Ex. 2, p. 127)

Claimant saw Dr. Boarini again on December 2, 2019. (Jt. Ex. 4, p. 166) At that time, claimant reported his low back pain was radiating into his right leg, but it was a "different" pain. He reported right anterior thigh burning, right-sided low back tightness, and occasional right leg numbness and tingling. He had done 4 weeks of physical

[4] There is some indication in the medical records that the surgery may have taken place on September 5, 2019.

therapy with some relief. Dr. Boarini felt claimant was improving nicely, and noted on examination that he was moving normally and his strength was intact. (Jt. Ex. 4, p. 167) Dr. Boarini released claimant from his care.

Claimant returned to Dr. Baker on December 13, 2019, with ongoing pain and a worsening spot on his back. (Jt. Ex. 2, p. 128) Dr. Baker provided a trigger point injection for myofascial pain syndrome. (Jt. Ex. 2, p. 131) Dr. Baker also noted claimant may need to see a pain specialist if the injection did not work. (Jt. Ex. 2, p. 130) At his next visit, Dr. Baker did make a referral to pain management. (Jt. Ex. 2, p. 135)

Claimant saw Jolene Smith, D.O., at Pain Specialists of Iowa, on December 31, 2019. (Jt. Ex. 9, p. 208) Dr. Smith noted that surgery had resolved most of claimant's leg pain, but he continued to have low back pain, worse on the right, which at times radiated to the left. On examination, Dr. Smith noted a fullness over the right lumbar paraspinal muscles with pain to palpation and which also produced right radiating leg pain. (Jt. Ex. 9, p. 209) She thought there could be several possibilities for claimant's ongoing pain. One possibility was ongoing nerve compression from either fluid accumulation or a new disc pathology. As such, she ordered a new lumbar MRI. (Jt. Ex. 9, p. 209)

The MRI took place on January 3, 2020, and claimant returned to Dr. Smith on January 10, 2020. (Jt. Ex. 2, p. 136; Jt. Ex. 9, p. 211) Dr. Smith reviewed the MRI, and noted multilevel spondylosis and neural foraminal narrowing. (Jt. Ex. 9, p. 212) She recommended a transforaminal epidural steroid injection (TFESI), which was performed on February 6, 2020. (Jt. Ex. 9, pp. 212-214) At his next visit with Dr. Smith on February 28, 2020, claimant reported fifty percent relief of his pain following the injection. (Jt. Ex. 9, p. 217) He had also recently completed a course of physical therapy, and his medications were proving effective in managing his pain.

On March 26, 2020, Dr. Baker signed a letter authored by claimant's attorney, and agreed that claimant's diagnosis was low back strain/sprain with radiculopathy and sciatica, which required a decompression laminectomy from L2-L5. (Jt. Ex. 2, p. 144) He further agreed that claimant's condition was materially and substantially aggravated by the traumatic work injury on January 18, 2019, and that as a result of the work injury, Dr. Baker had taken him off work on October 28, 2019. (Jt. Ex. 2, p. 144)

Claimant's next follow up appointment was on April 29, 2020, with Rebekah Rogers, ARNP, who practices at Dr. Smith's office. (Jt. Ex. 9, p. 220) The appointment took place via videoconferencing due to the COVID-19 pandemic, to minimize risk of exposure in an "at risk/vulnerable/elderly person." Ms. Rogers noted claimant's report of worsening back pain over the prior 2 weeks, limiting his ability to function. His pain had increased and was waking him up at night. He had contemplated going to the emergency room. His pain was located in the low back, with radiation to his bilateral hips, and down his bilateral anterior thighs to knees. (Jt. Ex. 9, p. 221) At that time, his left leg pain was worse than the right, and the left leg pain was constant while the right was intermittent. Ms. Rogers recommended bilateral L4 TFESI on an urgent basis,

given claimant's uncontrolled pain and in order to keep him out of the emergency room. (Jt. Ex. 9, p. 222) The risk of potential exposure to COVID-19 was discussed, and despite his status as an "at risk/vulnerable/elderly person," claimant was willing to accept that risk in order to receive the injection.

On May 6, 2020, Dr. Smith responded to questions posed in a letter from claimant's attorney. (Jt. Ex. 9, p. 228) She agreed that claimant's diagnosis was low back pain and lumbar radiculopathy which required a decompression laminectomy from L2-L5. She agreed that the condition was materially and substantially aggravated by the traumatic work injury on January 18, 2019. Finally, she agreed that the ongoing medical care and treatment she had been providing and continued to provide was reasonable and necessary because of the work injury. (Jt. Ex. 9, p. 228)

Claimant had the bilateral TFESI on May 7, 2020. (Jt. Ex. 9, p. 225) His next follow up visit was again with Ms. Rogers, via videoconference, on June 19, 2020. (Jt. Ex. 9, p. 229) He reported a 30 percent reduction in his pain after a medication change, but continued to complain of worsening left sided low back pain with radiation down his left leg. He noted that following his last TFESI, he had good relief of his right sided symptoms, and initially had about 40 percent relief of his left sided symptoms. (Jt. Ex. 9, p. 230) However, a few days later he had significant worsening of his left sided symptoms. Ms. Rogers ordered an updated lumbar MRI. (Jt. Ex. 9, p. 231)

Claimant saw Ms. Rogers in the clinic on July 14, 2020, for review of the recent MRI. (Jt. Ex. 9, p. 233) He reported continued pain in his left low back with radiation to his left leg, but it was "a little better" after adding a new medication. Upon review of the most recent MRI dated June 25, 2020, Ms. Rogers noted no significant changes from the previous MRI. (Jt. Ex. 9, p. 234) She indicated claimant's symptoms and examination were consistent with left lumbar radiculopathy with evidence of significant left neural foraminal narrowing at both L2 and L4, and recommended left L2, L4 TFESI. (Jt. Ex. 9, p. 234)

The TFESI took place on July 21, 2020. (Jt. Ex. 9, p. 236) Claimant followed up via videoconference with Ms. Rogers on August 19, 2020. (Jt. Ex. 9, p. 239) At that time, claimant reported 50 percent relief from the injection, and the relief was continuing. His pain was starting in the left hip area at that time, radiating down the anterior left leg to his knee. Since his pain had improved, Ms. Rogers ordered physical therapy to work on core strengthening for his left leg. (Jt. Ex. 9, p. 240)

Claimant had 4 physical therapy sessions between August 28 and September 17, 2020. (Jt. Ex. 7, p. 199) He was then discharged due to "lack of improvement." (Jt. Ex. 7, p. 200) He followed up with Ms. Rogers on October 14, 2020, and reported he only participated in one session of physical therapy, and the therapist told him no further treatment was needed. (Jt. Ex. 9, p. 242) While he still reported pain, he told Ms. Rogers his pain was tolerable at that point, and he did not think his epidural had worn off yet. (Jt. Ex. 9, p. 243) However, by his December 18, 2020 visit, the epidural had worn off. (Jt. Ex. 9, p. 245) He reported continuing to do his home exercises from

physical therapy, as they seemed to be helpful. Ms. Rogers recommended repeat bilateral L4 TFESI, which took place on January 4, 2021. (Jt. Ex. 9, pp. 246; 248)

On January 7, 2021, claimant had an IME, at his attorney's request, with John Kuhnlein, D.O. (Jt. Ex. 10) Dr. Kuhnlein's report is dated January 25, 2021. (Jt. Ex. 10, p. 257) He reviewed 1,105 pages of medical records. (Jt. Ex. 10, p. 266) At the time of the IME, claimant had very recently had injections, but his symptoms were beginning to return. (Jt. Ex. 10, p. 261) After reviewing medical records and examining claimant, Dr. Kuhnlein's diagnoses were lumbar stenosis with radiculopathy and chronic neurogenic claudication with L2-L5 laminectomies and medial facetectomies, and right knee contusion – resolved. (Jt. Ex. 10, p. 264) Dr. Kuhnlein noted that while claimant had intermittent treatment for back pain in the past related to his driving activities, his symptoms generally improved with chiropractic care. There was no evidence in the medical records Dr. Kuhnlein reviewed to indicate "continuous care for low back complaints." (Jt. Ex. 10, p. 264) However, after the work incident, claimant's symptoms no longer improved with chiropractic care, leading up to additional treatment and eventual surgery with Dr. Boarini. As such, Dr. Kuhnlein opined, "the nature of the pain, dysfunction, and medical care for that pain changed after the incident occurred." (Jt. Ex. 10, p. 264) He concluded that the work incident materially aggravated claimant's preexisting lumbar stenosis, producing radiculopathy and neurogenic claudication. (Jt. Ex. 10, p. 264)

With respect to future treatment, Dr. Kuhnlein recommended that claimant lose weight and work on core strengthening. He suggested pool exercise to increase his endurance. He recommended continuing his same medications and pain management, but suggested weaning him off hydrocodone. (Jt. Ex. 10, p. 264) Dr. Kuhnlein placed claimant at MMI as of March 3, 2020. Using the Fifth Edition of the AMA Guides, Dr. Kuhnlein assigned a 12 percent whole person impairment rating. (Jt. Ex. 10, p. 265) Finally, he recommended permanent restrictions of lifting 20 pounds occasionally from floor to waist and waist to shoulder, and 10 pounds occasionally over the shoulder. He also suggested walking, standing, and sitting as tolerated, rare stooping, squatting, bending, and crawling, and occasional kneeling, among other things. (Jt. Ex. 10, p. 265) In an addendum dated April 1, 2021, Dr. Kuhnlein further stated that claimant would not be able to pass a DOT examination given his physical limitations. (Jt. Ex. 10, p. 268)

Claimant had a follow up with Ms. Rogers on February 9, 2021, and reported 60 percent relief from his most recent TFESI, and resolution of his leg pain. (Jt. Ex. 9, p. 251) His main complaint at that time was lumbar spasms. However, on physical exam, he had significant tenderness to palpation and palpable muscle spasms. As such, he was provided with in-office trigger point injections that day. (Jt. Ex. 9, pp. 252; 254)

On April 16, 2021, claimant underwent a right lumbar radiofrequency ablation at L3-4, L4-5, and L5-S1. (Jt. Ex. 9, p. 256) Claimant testified that the procedure helped, as it stopped "the pulsating of my muscle spasms. It's eased it. It's not quite as bad as it was. It has improved." (Tr., p. 67) Claimant also testified that he agrees with the

restrictions Dr. Kuhnlein recommended, and that he has lost at least 40 percent of his strength since the work injury. (Tr., pp. 67-68)

Claimant has requested an order directing defendants to pay for his medical care following defendants' withdrawal of authorization for care on August 28, 2019. I find that claimant's care related to his low back injury following that date is related to the injury that occurred on January 18, 2019. I do not find Dr. Jacoby's opinion, that claimant would not need injections or surgery, to carry as much weight as those of the other physicians who treated claimant. Dr. Boarini in fact performed surgery after Dr. Jacoby issued his opinion that very little additional treatment was necessary. It does not appear from his report that Dr. Jacoby reviewed the actual MRI films. Additionally, there is no evidence he was asked to revisit his opinions after claimant had surgery and additional treatment. There is no evidence in the record indicating that surgery was unreasonable or unnecessary. There is likewise no evidence to rebut the opinions of Dr. Baker, Dr. Smith, and Dr. Kuhnlein, who all agree that the surgery and additional treatment claimant has received is related to the work injury. As such, defendants are responsible for all medical treatment claimant has received related to his back injury since January 18, 2019.

Claimant had a vocational interview with Phil Davis, M.S., CBIS, on March 31, 2021. (Cl. Ex. 21, p. 302) Mr. Davis's report is dated April 13, 2021. In addition to interviewing claimant, Dr. Davis also reviewed medical records and other information related to claimant's case. (Cl. Ex. 21, p. 302) Mr. Davis noted that when considering the impact an injury may place upon a person's current or future employability, "a multitude of factors need to be considered." (Cl. Ex. 21, p. 306) Those factors include, but are not limited to, the potential loss of access to one's general labor market as a result of the injury and subsequent permanent restrictions, and the individual's transferrable work skills based on past employment activities and training. (Cl. Ex. 21, p. 306) Based on those factors, as well as his vocational research and his vocational and job placement expertise, Mr. Davis opined that claimant is no longer physically capable of performing any of his past employment activities. (Cl. Ex. 21, p. 307) Considering the permanent restrictions set forth by Dr. Jacoby, Dr. Baker, and Dr. Kuhnlein, claimant is limited to perform work in the sedentary to light physical demand level. Additionally, Dr. Kuhnlein has opined that claimant would not be able to pass a DOT examination given his limitations. Mr. Davis went on to note that claimant has limited transferrable work skills, as all of his past employment involved skilled employment as a truck driver. While he maintains specific knowledge and training related to his past employment, he is now 100 percent physically precluded from performing the functions of his past jobs. Based on those factors, Mr. Davis opined that claimant has lost access to greater than 90 percent of his pre-injury labor market. (Cl. Ex. 21, p. 308)

Defense counsel took Mr. Davis's deposition on May 17, 2021. (Def. Ex. G) Mr. Davis acknowledged during his deposition that he was not provided with any records of claimant's medical condition prior to the date of injury. (Def. Ex. G, p. 26) He further did not recall any conversation with claimant during his interview regarding his prior medical complaints, but he did recall seeing mention of prior chiropractic visits in the medical

records he reviewed. (Def. Ex. G, p. 27) Mr. Davis testified that he is not aware of any difficulty claimant may have had performing his job as an over-the-road truck driver prior to the injury on January 18, 2019. (Def. Ex. G, pp. 27-28) However, it is fair to assume he was working, and working successfully prior to his work injury, given that he was employed in his chosen profession. (Def. Ex. G, p. 28) It would also be fair to assume that claimant did not have difficulty performing his job duties prior to the work injury. (Def. Ex. G, p. 29) However, if that assumption was incorrect, Mr. Davis indicated that he would potentially have to revisit his conclusions. (Def. Ex. G, p. 30) Likewise, Mr. Davis acknowledged that if the information claimant provided to him in their interview was inaccurate, he might have to revisit his opinions. (Def. Ex. G, p. 36) Claimant's attorney then asked Mr. Davis if his opinions remained the same as expressed in his April 13, 2021 report, and he agreed that his opinions were unchanged. (Def. Ex. G, p. 37)

Defendants argue that Mr. Davis's opinions carry no weight because he was "completely and totally unaware of claimant's medical or chiropractic treatment, difficulty with over-the-road driving, or ability to work prior to the above date [January 8, 2019]." (Defendants' post-hearing brief, p. 12) To the contrary, I find that defendants misrepresent the testimony of both Mr. Davis and claimant. First, there is no evidence that claimant had any treatment for his back other than intermittent chiropractic care prior to the work injury. Mr. Davis testified that he did recall seeing mention of claimant's prior chiropractic care in the medical records he reviewed. (Def. Ex. G, p. 27) It was also clarified later in the deposition that Mr. Davis was aware that claimant had prior problems with his back:

> Q. Okay, So, now hearing that - - and this is not the first time you heard that. You heard that both on reading the records and talking to Mr. Middlebrook; correct?
>
> A. Heard what?
>
> Q. That there was some prior problems with Mr. Middlebrook's back even before January 8 (sic), 2019.
>
> A. Yes. I had mentioned that earlier in our conversation here.
>
> (Def. Ex. G, p. 35)

Second, defendants' characterization of claimant's treatment prior to the date of injury as "continuous" is also a misrepresentation. (Def. Brief, p. 12) The medical records in evidence indicate that claimant attended a total of 17 chiropractic visits over the course of three years prior to the date of injury. (Jt. Ex. 1, pp. 1-34) There are no other medical records in evidence that predate the work injury.

Additionally, defendants misrepresent both claimant's and Mr. Davis's testimony regarding claimant's "difficulty" with driving and ability to work prior to the date of injury.

At his deposition, claimant testified that his overall physical well-being prior to the date of injury was "fine," although he had occasional low back pain. (Def. Ex. E, Dep. Tr., p. 39) He described his back pain prior to the injury as "just sore - - just soreness." (Def. Ex. E, Dep. Tr., p. 27) He further stated, "just going to a chiropractor, that usually took care of it." (Def. Ex. E, Dep. Tr., p. 27) There is no single instance anywhere in claimant's deposition testimony in which he states that prior to the January 18, 2019 injury, he had difficulty driving or otherwise performing his job. In fact, when asked if he would characterize his prior back pain as permanent in nature, claimant disagreed. (Def. Ex. E, Dep. Tr., p. 42-44) He specifically stated "[i]f I had something permanent, I wouldn't be driving." (Def. Ex. E, Dep. Tr., p. 44)

Likewise, at hearing, claimant did not once testify that he had difficulty performing his job prior to the work injury. To the contrary, he specifically testified that he did not have problems with his driving, but his back hurt. (Tr., p. 114) His testimony that driving over rough roads at times caused his back pain to increase is not the same as testifying that his back pain caused him to have difficulty driving or performing his job duties.

Overall, claimant's consistent testimony was that prior to the work injury, he was able to successfully drive and perform the duties of his job, including occasional lifting up to 70 pounds. Occasionally he experienced back pain, for which he would sometimes seek chiropractic care, and the pain would resolve. On redirect examination, his testimony was summarized quite succinctly:

> Q. Randy, prior to the work injury at issue, did you have back pain from time to time?
>
> A. Yes.
>
> Q. Prior to the work injury were you always able to do your job duties as a truck driver for East Penn even with some back pain?
>
> A. Yes.

(Tr., p. 117)

Claimant did not tell Mr. Davis that he had difficulty performing his job duties prior to the work injury because prior to the work injury, he did not have difficulty performing his job duties. As such, any hypothetical question regarding same that would cause Mr. Davis to "possibly" reconsider his opinions is irrelevant. His report is based on accurate and complete information, is supported by the record and claimant's credible testimony, and is not rebutted. I find Mr. Davis's report credible.

Defendants further argue that Mr. Davis's opinions carry no weight because of a prior opinion he authored and prior employment issues he may have experienced. (See Def. Ex. G, H, I) Mr. Davis's prior opinion referenced in

defendants' exhibit H is completely irrelevant to the case at issue. The limited information in evidence regarding that case presents no actual basis for finding that Mr. Davis is a biased, unethical, or otherwise unreliable witness. Likewise, any potential employment issues he personally may have experienced in the distant past are not relevant. The letter contained in Exhibit I is hearsay, which while admissible, is afforded no weight, especially considering Mr. Davis's testimony about the issue, in which he denied the allegations therein. (Def. Ex. G, pp. 14-19)

Finally, defendants argue that Mr. Davis is not qualified to offer opinions because he is not a certified vocational rehabilitation counselor, and he is uncertain if loss of earning capacity and industrial disability are synonymous. (Def. Br., p. 14) Mr. Davis has a Master of Science Degree in Counseling Education with an emphasis in vocational rehabilitation. (Cl. Ex. 22, p. 309; Def. Ex. G, p. 5) He has been working as either a vocational counselor, job placement specialist, and/or vocational specialist since approximately 1996. (Cl. Ex. 22, pp. 309-311) I find he is sufficiently qualified to offer his opinions in this matter. Additionally, it is not Mr. Davis's job to determine industrial disability, as he acknowledges in his report. (Cl. Ex. 21, p. 308) Rather, the purpose of his report was "to provide an opinion with regard to the vocational implications that Mr. Middlebrook's work injury of 1/8/19 (sic) has placed upon his current or future employability." (Cl. Ex. 21, p. 302) As such, his inability to precisely define industrial disability is not a disqualifying factor. He clearly set forth the factors upon which his opinion was based, and concluded that claimant is no longer physically capable of performing any of his past employment activities. (Cl. Ex. 21, pp. 306-307)

Defendants also argue that claimant was not a credible witness, and that he did not provide an accurate history to his treating medical providers or expert witnesses. However, once again, defendants misrepresent claimant's testimony and prior medical history. First, with respect to his deposition testimony, defendants argue that claimant provided conflicting testimony about his prior back complaints. (Def. Br., p. 4) However, the testimony cited is taken out of context. Claimant testified that he first remembered having back pain "about 15 years ago, maybe more." (Def. Ex. E, Dep. Tr., p. 13) He then stated it was when he worked at Jimmy Dean, about 26 years ago. He did not take any time off from Jimmy Dean due to the work injury, and treated with a chiropractor. (Def. Ex. E, Dep. Tr., p. 22) Defendants then argue that claimant testified that after leaving Jimmy Dean, he did not have any additional back complaints. (Def. Br., p. 4) However, that was not claimant's testimony. The specific question asked was whether claimant had low back complaints after leaving Jimmy Dean "before working at East Penn." (Def. Ex. E, Dep. Tr., p. 24) Claimant replied "not that I recall." Defendants then argue that claimant later testified he "actually had regular back complaints every couple of weeks or so after leaving Jimmy Dean." (Def. Br., p. 4) Again, that was not claimant's testimony. The line of questioning started with whether claimant had any back complaints "all the way back to Jimmy Dean. . ." (Def. Ex. E, Dep. Tr., p. 26) Claimant replied yes, and that he would just have soreness and that going to a chiropractor would

usually take care of it. (Def. Ex. E, Dep. Tr., pp. 26-27) Then he was asked about back complaints when he worked at NAPA, and claimant recalled it was actually a knee complaint he had while working there. (Def. Ex. E, Dep. Tr., pp. 27-28) Claimant then testified he's been seeing his chiropractor, Dr. Heffron, for "a couple years, maybe more." When asked how often he had low back complaints, claimant testified "[s]ometimes a couple weeks, maybe a couple – maybe a couple in a month or a month maybe," and when he had those complaints, he'd see Dr. Heffron. (Def. Ex. E, Dep. Tr., p. 32)

Claimant has worked at East Penn since December 2010. He testified that he has been seeing Dr. Heffron for "a couple years, maybe more," which is consistent with Dr. Heffron's records, which date back to 2016. Claimant testified that he did not have low back complaints after leaving Jimmy Dean "before working at East Penn," but he did have low back complaints before the January 18, 2019 work injury. Nothing in claimant's testimony is inconsistent. There is no evidence in the record to suggest claimant had any treatment for low back pain prior to the January 18, 2019 work injury other than 17 chiropractic visits over the course of three years. Dr. Perea noted at claimant's first visit after the injury that claimant's past medical history was notable for "a history of episodic low back pain *without formal low back pain workup*. . ." (Jt. Ex. 2, p. 87) (emphasis added) Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

Finally, defendants argue that claimant's optimism that he might be able to return to work at East Penn precludes him from receiving permanent disability benefits. This argument fails for a number of reasons. First, claimant's optimism and hopefulness that he might be able to return to what he described as a "dream job," (Tr., p. 85) is not a basis for denying benefits. He has kept in touch with his supervisor to see if there is any kind of work available he can perform. (Tr., p. 79) Unfortunately, he has not been offered any work by East Penn, and has been advised that he must have a full-duty work release in order to return. (Tr., p. 79; Def. Ex. E, Dep. Tr., pp. 11; 63) Claimant described the company as excellent, and like family. (Def. Ex. E, Dep. Tr., p. 54) He planned to continue working as long as his body would allow. (Def. Ex. E, Dep. Tr., p. 59) The fact that he is hopeful that his condition may someday improve enough to allow him to return only shows his motivation to continue working.

Another indication of claimant's motivation and mindset is reflected by the job search logs he provided. (Cl. Ex. 18) Once he had received specific restrictions from Dr. Kuhnlein, he registered on Indeed.com and began looking for any type of work he might be able to perform. (Tr., p. 77) Prior to that, Dr. Baker had told him to stay completely off work. Claimant kept track of all the jobs he reviewed, but he only actually applied for one position. (Cl. Ex. 18, Tr., pp. 77-79; 118-119) The reason he did not apply for more is because he knew that he was either not qualified, or not physically capable of performing the others he found. (Tr., pp. 118-119)

I find that based on the preponderance of the evidence, including claimant's credible testimony, he has proven that he sustained a permanent and material aggravation of his preexisting low back condition due to the work injury on January 18, 2019. The injury directly resulted in the need for claimant to undergo surgery with Dr. Boarini, and in the need for his continuing pain management treatment with Dr. Smith and Ms. Rogers. Due to the work injury, claimant now has permanent restrictions that disable him from performing work that his experience, training, education, and physical capacities would otherwise permit him to perform. I find that claimant is permanently and totally disabled. Claimant last worked on July 26, 2019. Therefore, the commencement date for permanent total disability benefits is July 27, 2019. As such, the issue of whether he is entitled to healing period benefits from July 27, 2019 to March 3, 2020, is moot.

CONCLUSIONS OF LAW

The first issue, whether claimant is entitled to temporary disability benefits, is moot. The next issue is the nature and extent of claimant's permanent disability. Claimant has alleged that he is permanently and totally disabled as a result of the work injury. Defendants disagree, and argue that any permanent disability is minimal.[5]

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

[5] Defendants also argue that claimant did not sustain an injury arising out of and in the course of his employment; however that issue was stipulated on the hearing report. Defendants further stipulated that the injury was a cause of permanent disability. (Hearing Report, p. 1)

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Apportionment of disability between a preexisting condition and an injury is proper only when some ascertainable portion of the ultimate industrial disability existed independently before an employment-related aggravation of disability occurred. Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Hence, where employment is maintained and earnings are not reduced on account of a preexisting condition, that condition may not have produced any apportionable loss of earning capacity. Bearce, 465 N.W.2d at 531. Likewise, to be apportionable, the preexisting disability must not be the result of another injury with the same employer for which compensation was not paid. Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990).

The burden of showing that disability is attributable to a preexisting condition is placed upon the defendant. Where evidence to establish a proper apportionment is absent, the defendant is responsible for the entire disability that exists. Bearce, 465 N.W.2d at 536-537; Sumner, 353 N.W.2d at 410-411.

In this case, I found that claimant has proven a permanent and material aggravation of his preexisting low back condition. Defendants have not shown that claimant's preexisting condition previously caused any disability. There is no evidence that claimant's prior intermittent back pain caused him any difficulty performing his job prior to the work injury. Claimant's prior back pain never caused the need for any formal back workup, never caused him to seek care from a specialist, and never resulted in surgery. He was working with no restrictions prior to the work injury. As such, claimant has proven a permanent injury to his low back as a result of the January 18, 2019 work injury.

Claimant sustained an injury to his low back, which resulted in permanent disability. Therefore, claimant has proven he sustained an unscheduled injury. While claimant did return to work for a time following the injury, as his condition continued to deteriorate, he was eventually taken off work. Since then, he has not returned or been offered work by the employer, and was not working at the time of hearing.

The workers' compensation commissioner has recently clarified that the post-injury "snapshot" of claimant's salary, wages or earnings should occur at the time of the hearing, just as industrial disability is measured as the evidence stands at the time of the hearing. Sharon Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. June 11,

2021). Performing the comparison based on a claimant's initial return to work could lead to unfair and illogical results. Id. (citing Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968) ("It is a familiar, fundamental rule of statutory construction that, if fairly possible, a construction resulting in unreasonableness as well as absurd consequences will be avoided.")); see also The Sherwin–Williams Co. v. Iowa Department of Revenue, 789 N.W.2d 417, 427 (Iowa 2010) ("'[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.'" (quoting Pac. Ins. Co. v. Or. Auto. Ins. Co., 490 P.2d 899, 901 (1971)).

At the time of hearing, claimant was not receiving or being offered work at the same or greater wages, salary, or earnings as he received at the time of the injury. This reduction in earnings has been persistent since shortly after claimant returned to work, and continued to decrease until he was eventually taken off work entirely. While he is technically still considered an employee, he is not able to work and is not being offered any work. As such, claimant has sustained an industrial disability, measured in relation to his reduction in earning capacity.

Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). The commissioner may also consider claimant's medical condition prior to the injury, immediately after the injury, and presently in rendering an evaluation of industrial disability. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632-633 (Iowa 2000) (citing McSpadden, 288 N.W.2d at 192).

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995); Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's

employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

In assessing an unscheduled, whole body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat. Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden, 288 N.W.2d at 192; Diederich, 258 N.W. at 902 (1935).

The focus for evaluating total disability is on the person's ability to earn a living. Diederich, 258 N.W. at 902. The question is whether the person is capable of performing a sufficient quantity and quality of work that an employer in a well-established branch of the labor market would employ the person on a continuing basis and pay the person sufficient wages to permit the person to be self-supporting. Tobin-Nichols v. Stacyville Community Nursing Home, File No. 1222209 (App. December 2003). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). Industrial disability is determined by the effect the injury has on the employee's earning capacity. Bearce, 465 N.W.2d at 535; Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa App. 2003).

Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190, 5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20,

1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. January 22, 1993); see also Larson's Workers' Compensation Law, Section 57.61, pp. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Nelson, 544 N.W.2d at 267. However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boone's Book and Bible Store, File No. 1059319, (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Having considered all of the evidence in the record, the greater weight of evidence in this case supports a finding that claimant is permanently and totally disabled. Claimant is a high school graduate with a one-year auto body repair degree. The bulk of his prior employment experience involves driving a tractor-trailer. He credibly testified that he can no longer perform all the job duties associated with truck driving, and the medical evidence supports that testimony. His physical limitations also prevent him from performing job duties associated with his other prior jobs, such as working the counter at NAPA or his work for the funeral home. Phil Davis opined that claimant has lost access to greater the 90 percent of his pre-injury labor market. I found Mr. Davis's opinions to be credible.

Considering claimant's age, educational background, employment history, permanent impairment, and permanent restrictions, as well as the other industrial disability factors set forth by the Iowa Supreme Court, I find that claimant is permanently and totally disabled.

Permanent total disability benefits are payable during the period of the employee's disability. Iowa Code section 85.34(3)(a). As a result, permanent total disability benefits generally commence on the date of injury. See Sandhu v. Nordstrom, Inc., File No. 5046628 (App. January 24, 2019). In this case, however, claimant did return to work until July 26, 2019. That was the last date on which claimant physically worked for the employer. It is not reasonable or logical to award permanent total disability benefits while claimant continued to work and earn wages with the employer. Miles v. City of Des Moines, File Nos. 5048896, 5048899 (Arb. September 30, 2020, aff'd on Appeal to Commissioner, March 1, 2021). Therefore, I find that the proper commencement date for permanent total disability benefits is July 27, 2019.

The next issue is whether claimant is entitled to payment of certain medical bills and alternate medical care. Defendants offer no direct argument in their brief as to why claimant would not be entitled to ongoing medical care for the accepted injury, but the

argument that the injury was only a temporary aggravation of his preexisting condition (despite the stipulation that the injury caused permanent disability) is apparently the basis for the denial of ongoing medical care after August 28, 2019. (Cl. Ex. 24, p. 315) I did not find Dr. Jacoby's opinion to carry as much weight as those of the other physicians who treated claimant. Dr. Boarini in fact performed surgery after Dr. Jacoby issued his opinion that very little additional treatment was necessary. There is no evidence in the record indicating that surgery was unreasonable or unnecessary, and likewise no evidence to rebut the opinions of Dr. Baker, Dr. Smith, and Dr. Kuhnlein, who all agree that the surgery and additional treatment claimant has received is related to the work injury. As such, defendants are responsible for all medical treatment claimant has received related to his back injury since January 18, 2019. This includes the subrogation claim of Capital BlueCross, which is found at claimant's exhibit 25.

Defendants are also responsible for future treatment related to claimant's back condition. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Defendants have not authorized medical care for claimant's condition since August 28, 2019. Therefore, claimant has proven that the employer is not authorizing medical care that is effective and reasonably suited to treat his injury. Defendants shall authorize and pay for all reasonable and causally related expenses with respect to claimant's ongoing treatment with Dr. Joel Baker and the providers at Pain Specialists of Iowa.

The next issue is payment of claimant's independent medical evaluation (IME) with Dr. Kuhnlein. Again, defendants offer no argument as to why they would not be responsible for this expense under Iowa Code section 85.39. That section permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Iowa Code section 85.39(2). In this case, Dr. Jacoby, retained by defendants, provided an impairment rating on May 7, 2019. As allowed by Iowa Code section 85.39(2), claimant had Dr. Kuhnlein, a physician of his choice, provide a rating dated January 25, 2021. Claimant has proven he is entitled to reimbursement for Dr. Kuhnlein's IME in the amount of $4,090.50, pursuant to Iowa Code section 85.39. (Jt. Ex. 12, p. 275)

The final issue for determination is claimant's request for reimbursement of costs. Claimant seeks reimbursement for the preparation of Mr. Davis's report, in the amount of $1,185.00. (Cl. Ex. 23, p. 313)

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states, in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports . . .

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). However, the Iowa Supreme Court has held that only the cost of drafting the expert's report is permissible in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015).

Mr. Davis provided an itemized billing statement indicating he spent 7.9 hours preparing the vocational report, for a total of $1,185.00. Defendants provide no argument to suggest this amount is unreasonable. As the cost of an expert report is an allowable cost, I award claimant costs in the amount of $1,185.00. (Cl. Ex. 23, p. 313)

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent total disability benefits, commencing July 27, 2019, at the stipulated rate of one thousand and 85/100 dollars ($1,000.85) per week.

Defendants shall be entitled to credits as stipulated on the hearing report.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants are responsible for all causally related medical treatment claimant received after the August 28, 2019 withdrawal of authorization. This includes the Capital

BlueCross subrogation claim. Defendants shall hold claimant harmless for any charges associated with his causally related medical care.

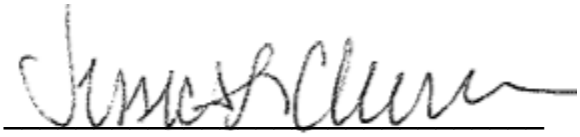
Defendants shall authorize and pay for all reasonable and causally related expenses with respect to claimant's ongoing treatment with Dr. Joel Baker and Pain Specialists of Iowa.

Defendants shall reimburse claimant in the amount of four thousand ninety and 50/100 dollars ($4,090.50) for Dr. Kuhnlein's IME report, pursuant to Iowa Code section 85.39.

Defendants shall reimburse claimant's costs in the amount of one thousand one hundred eighty-five and 00/100 dollars ($1,185.00), representing Mr. Davis's vocational report.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 11th day of January, 2022.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Corey Walker (via WCES)

Tiernan Siems (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.